



OFFICE OF
CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

SEP 12 2002

CC:INTL:4
PRENO-140193-02
UIL: 1446.08-00; 6402.00-00;
6501.04-00; 6611.00-00

MEMORANDUM FOR RONALD P. RIVELLI

CHIEF, PARTNERSHIPS, TRUSTS & INTERNATIONAL
SECTION S:CAS:B:P

FROM:

Michael H. Frankel
Michael H. Frankel, STR, Branch 4, Associate Chief Counsel
(International)

SUBJECT: Refunds of section 1446 tax

This memorandum responds to your Request for Advice dated July 8, 2002, concerning refunds of section 1446 tax withheld on behalf of foreign partners. More specifically, you posed the following questions:

1. Whether a Form 1040-NR with a different TIN number than that of the Form 8805 statement constitutes a valid return for purposes of the statute of limitations on assessment under IRC Section 6501?
2. If the 1040-NR return with Form 8805 (wrong TIN's) constitutes a valid return, then does the return constitute a valid claim for refund for purposes of IRC Section 6402?
3. If the 1040-NR return with Form 8805 (wrong TIN's) constitutes a valid return and a valid claim for refund, then can the return be considered to be in a processible form for purposes of IRC Section 6611?

CONCLUSIONS

1. A foreign partner's U.S. income tax return that claims a refund and shows the partner's correct TIN on the return, but includes a Form 8805 with an incorrect TIN or no TIN, constitutes a valid return for purposes of the statute of limitations on assessment under section 6501 of the Code.
2. The return constitutes a valid claim for refund for purposes of section 6402 of the Code.

PMTA: 00563

PRENO-140193-02

3. The return is not in processible form for purposes of section 6611 of the Code. As a result, the Service will not be required to pay overpayment interest until the return is in processible form.

FACTS

Section 1446 of the Code imposes a withholding tax on partnerships that have effectively connected taxable income allocable under section 704 to foreign partners. A partnership is required to withhold and pay over to the Service the section 1446 withholding tax on an installment basis pursuant to procedures set forth in Rev. Proc. 89-31, 1989-1 C.B. 895. Under section 1446(d)(1), each foreign partner of a partnership is allowed a credit under section 33 for the withholding tax paid by the partnership on the foreign partner's behalf. Such credit is allowed for the partner's taxable year in which (or with which) the partnership taxable year (for which such tax was paid) ends.

Pursuant to Rev. Proc. 89-31, as a partnership makes withholding tax payments under section 1446 on behalf of a foreign partner, it is required to notify the partner of the withholding tax paid on the partner's behalf. After the conclusion of the partnership's taxable year, and among other reporting obligations, the partnership is required to submit to the Service, and the foreign partner, Form 8805, Foreign Partner's Information Statement of Section 1446 Withholding Tax. The Form 8805 issued to a partner summarizes the withholding tax paid on the partner's behalf during the partnership's taxable year. The foreign partner must attach Form 8805 to its U.S. tax return to claim the credit described in section 1446(d)(1). The foreign partner attaches Form 8805 to the front of its U.S. tax return in the same manner that the Form W-2 is attached to the U.S. tax return of an employee who has earned wages subject to income tax withholding. Therefore, the foreign partner must attach Form 8805 to its U.S. income tax return (Form 1040NR, "U.S. Nonresident Alien Income Tax Return," Form 1120-F, "U.S. Income Tax Return of a Foreign Corporation," or Form 1041 "U.S. Income Tax Return for Estates and Trusts") filed for the taxable year.

The Service periodically receives U.S. income tax returns filed by foreign partners that claim a credit for the tax withheld under section 1446 and that seek a refund for the withheld amount where the foreign partner's correct TIN is listed on the U.S. income tax return filed, but where the TIN on the Form 8805 that is attached to the U.S. tax return is either incorrect or not provided. The Service desires guidance on the handling of such claims of credit and refunds in such situations.

PRENO-140193-02

LAW AND ANALYSIS

Issue 1

Section 6011 of the Code provides that any person made liable for any tax imposed by this title, or with respect to the collection thereof, shall make a return or statement according to the forms and the regulations prescribed by the Secretary. Every person required to make a return or statement shall include therein the information required by such forms and regulations.

Section 1.6011-1(b) of the Income Tax Regulations provides that each taxpayer should carefully prepare his return and set forth fully and clearly the information required to be included therein. Returns which have not been so prepared will not be accepted as meeting this requirement of the Code.

Although Congress has granted the Commissioner broad authority to determine what information should be submitted with a tax return, the issue of what constitutes a valid tax return is frequently litigated. In an early case addressing the issue, the Supreme Court stated that "perfect accuracy or completeness is not necessary to rescue a return from nullity, if it purports to be a return, is sworn to as such, and evidences an honest and genuine endeavor to satisfy the law." Zellerbach Paper Co. v. Helvering, 293 U.S. 172, 180 (1934).

Courts have subsequently stated the criteria for a valid return as being: "First, there must be sufficient data to calculate tax liability; second, the document must purport to be a return; third, there must be an honest and reasonable attempt to satisfy the requirements of the tax law; and fourth, the taxpayer must execute the return under penalties of perjury." Beard v. Commissioner, 82 T.C. 766, 777 (1984), *aff'd per curiam*, 793 F.2d 139 (6th Cir. 1986). This statement of the criteria, generally known as the Beard formulation, derives from a venerable line of Supreme Court cases. See Zellerbach Paper Co. v. Helvering, 293 U.S. 172, 180 (1934); Florsheim Bros. Drygoods Co. v. United States, 280 U.S. 453 (1930). The Beard formulation is generally known as the "substantial compliance" standard. If an income tax return meets the "substantial compliance" standard, the return is a valid return for purposes of the statute of limitations on assessment.

There is no bright line test to determine whether an income tax return with an attached form that contains incorrect information or missing information is a valid return. Rather, courts typically apply the "substantial compliance" standard to the specific facts of each case. In Blount v. Commissioner, the court found that a Form 1040 that was filed without a Form W-2 met the "substantial compliance" standard and did not prevent the calculation of tax liability. See Blount v. Commissioner, 86 T.C. 383 (1986), *acq.* in result, 1986-2 C.B. 1. In a recent Service Center Advice, SCA 200233003 (June 13, 2002) we concluded that a completed Form 1040 with a correct ITIN, but with an attached Form W-2 with an incorrect SSN, meets

PRENO-140193-02

the "substantial compliance" standard and is a valid return for purposes of the statute of limitations on assessment under section 6501 of the Code.

In the present case, we note that a Form 8805 serves a similar purpose as a Form W-2 (i.e., notifies the Service and the taxpayer of tax withheld on behalf of the taxpayer). Therefore, based on Blount and SCA 200233003, we conclude that a completed U.S. income tax return with a correct TIN, but with an attached Form 8805 with an incorrect TIN or no TIN, meets the "substantial compliance" standard and is a valid return for purposes of section 6501.

Issue 2

Section 6402(a) of the Code provides that in the case of any overpayment, the Secretary, within the applicable period of limitations, may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment and shall, subject to certain offsets, refund any balance to such person.

Section 301.6402-2(a) of the Regulations on Procedure and Administration (regulations) provides that credits or refunds of overpayments may not be allowed or made after the expiration of the statutory period of limitation properly applicable unless, before the expiration of such period, a claim therefor has been filed by the taxpayer.

Section 301.6402-2(b) of the regulations provides, as a general rule, that all claims for credit or refund must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof.

Section 301.6402-3 of the regulations provides special rules for refund claims of income tax. Section 301.6402-3(a)(5) provides that a properly executed individual, fiduciary, or corporate original income tax return shall constitute a claim for refund or credit for the amount of the overpayment disclosed by such return. To constitute a sufficient claim for refund, the income tax return must set forth the amount determined as an overpayment and should advise the Service whether such amount shall be refunded to the taxpayer or shall be applied as a credit against the taxpayer's estimated income tax for the succeeding taxable year.

The purpose of the general rule of section 301.6402-2(b) of the regulations, which requires taxpayers to set forth in detail each ground upon which a refund is claimed, is to adequately notify the Service of the grounds on which the taxpayer's claim is based, allowing the Service to properly investigate the claim. Angelus Milling Co. v. Commissioner, 325 U.S. 293 (1945). Section 301.6402-3(a)(5) provides a simplified procedure to notify the Service of the grounds for the claim where the taxpayer makes a refund claim on the original or amended income tax return for the taxable year. In such a case, the taxpayer must simply set

PRENO-140193-02

forth the amount of the overpayment and request that it be refunded or credited. If the return meets the Beard "substantial compliance" standard, and the requirements of section 301.6402-3(a)(5), it will generally meet the requirements of section 301.6402-2(b). See generally Fearis v. United States, 548 F.Supp. 408 (N.D. Tex. 1982); United States v. Ryan, 64 F.3d 1516 (11th Cir. 1995); Sumrall v. United States, 98-2 USTC P50,689 (D. Colo. 1998).

In the present case, the Form 1040NR, Form 1120-F, or Form 1041 meets the Beard "substantial compliance" standard, sets forth an amount claimed as an overpayment, and advises the Service whether the overpayment shall be refunded to the foreign partner. Although the attached Form 8805 shows an incorrect TIN or no TIN, the Service is adequately notified of the grounds for the foreign partner's claim on the return. Therefore, the return constitutes a valid claim for refund. However, the Service cannot determine from the return that the foreign partner made an overpayment because the Service cannot verify from the Form 8805 that the tax reported on the return as withheld by the partnership on behalf of the foreign partner is properly attributable to the foreign partner. Until the mismatch between the TIN on the U.S. income tax return and the TIN on Form 8805 has been satisfactorily resolved, the Service cannot determine that a "person... made the overpayment" that must be refunded under section 6402(a) of the Code. If the Service does not issue the refund, the foreign partner may file a suit for refund under section 6532(a)(1) once the Service renders a decision on the claim, provided the applicable period of limitations has not expired. If the Service does not render a decision, the partner may file a suit for refund beginning 6 months after the date the claim for refund is filed.

Issue 3

Section 6611(a) of the Code provides that interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax at the overpayment rate established under section 6621.

Section 6611(b)(3) of the Code provides that in the case of a return filed after the last date prescribed for filing the return (determined without regard to extensions), no interest shall be allowed or paid for any day before the date on which the return is filed.

Section 6611(e)(1) of the Code provides that if any overpayment of tax is refunded within 45 days after the last day prescribed for filing the return of such tax (determined without regard to any extension of time for filing the return) or, in the case of a return filed after such last date, is refunded within 45 days after the date the return is filed, no interest shall be allowed under section 6611(a) on such overpayment.

Section 6611(g) of the Code provides that for purposes of sections 6611(b)(3) and 6611(e), a return shall not be treated as filed until it is filed in processible form. A return is in processible form if (1) it is filed on a permitted form; and (2) it contains the taxpayer's name,

PRENO-140193-02

address, identifying number, the required signature, and sufficient required information (whether on the return or on required attachments) to permit the mathematical verification of tax liability shown on the return.

The legislative history to section 6611(g), formerly section 6611(h), states:

The committee believes that it is inappropriate to require that the United States pay interest on amounts prior to the time it has notice that it owes such an amount. Thus, no interest is payable with respect to any overpayment until the Secretary can determine that such an overpayment exists... by way of a notice of such overpayment... being filed in processable [sic] form. [See S. Rep. No. 494, Vol. 1, 97th Cong., 2d Sess. 307 (1982).]

Section 301.6611-1(g)(2) of the proposed Regulations on Procedure and Administration provides that the term "return" includes all components of the return. A component of the return is a required attachment, supporting document, or schedule required by the return, whether or not the information from the document or schedule appears on the return itself. Supporting documents and schedules include, for example, Form W-2, Schedule D, Form 3903, Schedule G, Form 3468, and Form 4625.

Section 301.6611-1(g)(3) of the proposed regulations provides that the return must contain the taxpayers name, address, identifying number, and authorized signature, and sufficient required information on the return and its components to permit the mathematical verification of the tax liability as shown on the return. The regulations further provide that, in the case of a component of the return, this information is required only to the extent required by the component.

According to the court in The Columbia Gas System, Inc. v. United States, "[m]athematical verifiability requires sufficient information to permit IRS to recalculate and corroborate the mathematics and data reported by the taxpayer. Thus, under section 6611, a taxpayer must submit, in good faith, all the required forms with the required signatures and enough underlying data for IRS to verify the tax liability shown on the return. The information must be sufficient to enable IRS to calculate the tax liability without undue burden." The Columbia Gas System, Inc. v. United States, 70 F.3d 1244, 1246 (Fed. Cir. 1995).

Although a U.S. income tax return with a foreign partner's correct TIN, but with a Form 8805 with an incorrect TIN or no TIN, appears to fall within the statutory definition of a return in "processable form" (*i.e.*, the return is filed on the proper form, contains a name, address, identifying number, is signed, and contains all the required schedules), it is not a return from which the Service "can determine that such an overpayment exists" (see Senate Finance Committee Report, *supra*). Until the mismatch between the TIN on the U.S. income tax return

PRENO-140193-02

and the TIN on Form 8805 has been satisfactorily resolved, the Service cannot determine that a "person... made the overpayment" that must be refunded under section 6402(a).

A U.S. income tax return with a foreign partner's correct TIN, but with a Form 8805 with an incorrect TIN or no TIN, does not meet the mathematical verification test because the Form 8805 does not provide sufficient information to allow the Service to corroborate the mathematics and data reported by the partner on the return. Form 8805 is a component of the return, and, if the Form 8805 has an incorrect TIN or no TIN, the return is not in processible form pursuant to section 301.6611-1(g)(3). The Service requires the correct TIN on the Form 8805 so that it can verify that the tax reported on the return as withheld by the partnership on behalf of the foreign partner is properly attributable to the foreign partner. Without the correct TIN on the Form 8805, the Service cannot determine without undue burden that the attached Form 8805 relates to the foreign partner. As a result, the return is not in processible form for purposes of section 6611(g), and overpayment interest will not begin to accrue until the return is in processible form.

The Service should promptly notify the foreign partner that a Form 8805 with a correct TIN must be filed to make the return in processible form. Once the Service receives the Form 8805 with a correct TIN that matches the TIN on the income tax return, the return will be in processible form for purposes of section 6611(g). If the Service issues the refund within 45 days from the date the return is in processible form, the Service will not owe overpayment interest on the refund. If the Service issues the refund after 45 days from the date the return is in processible form, the Service will owe overpayment interest on the refund from the date the return is in processible form. See section 6611(e).

If you have further questions concerning the above matters, please contact our office at (202) 622-3860.